

FILED BY CLERK

FEB 12 2010

COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA,)	
)	
Respondent,)	2 CA-CR 2009-0284-PR
)	DEPARTMENT A
v.)	
)	<u>MEMORANDUM DECISION</u>
)	Not for Publication
SHANE GERALD McMILLIN,)	Rule 111, Rules of
)	the Supreme Court
Petitioner.)	
)	

PETITION FOR REVIEW FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20053672

Honorable Hector E. Campoy, Judge

REVIEW GRANTED; RELIEF DENIED

Barbara LaWall, Pima County Attorney
By Jacob R. Lines

Tucson
Attorneys for Respondent

The Hopkins Law Office, P.C.
By Cedric Martin Hopkins

Tucson
Attorney for Petitioner

E S P I N O S A, Presiding Judge.

¶1 Following a jury trial, petitioner Shane McMillin was convicted of theft of means of transportation, third-degree burglary, fleeing from a law enforcement vehicle,

and criminal damage. The trial court imposed concurrent, presumptive prison terms, the longest of which was 11.25 years. On appeal, we affirmed McMillin's convictions and sentences, with the exception of the criminal damage count, which we vacated and remanded solely for resentencing. *State v. McMillin*, No. 2 CA-CR 2006-0267 (memorandum decision filed April 6, 2007).¹ In April 2009, McMillin sought post-conviction relief pursuant to Rule 32, Ariz. R. Crim. P., claiming trial counsel had been ineffective for failing to request a hearing pursuant to *State v. Dessureault*, 104 Ariz. 380, 453 P.2d 951 (1969).² The trial court dismissed the petition without conducting an evidentiary hearing, and this petition for review followed. "We will not disturb a trial court's ruling on a petition for post-conviction relief absent a clear abuse of discretion." *State v. Swoopes*, 216 Ariz. 390, ¶ 4, 166 P.3d 945, 948 (App. 2007). We find no abuse here.

¶2 In order to state a colorable claim of ineffective assistance of counsel, a defendant must establish that counsel's performance fell below an objectively reasonable professional standard and that the deficient performance was prejudicial to the defense. *Strickland v. Washington*, 466 U.S. 668, 687 (1984); *State v. Nash*, 143 Ariz. 392, 397,

¹Although we affirmed the criminal damage conviction, remanding only for resentencing, we note that the trial court stated in its minute entry dismissing McMillin's petition for post-conviction relief that the criminal damage count instead had been dismissed on remand. We cannot tell from this record whether that actually occurred.

²The trial court noted in an April 2008 ruling that the notice of post-conviction relief filed that same month was untimely, but we can infer from the record that the court nonetheless permitted McMillin to proceed. *See* Ariz. R. Crim. P. 32.4(a).

694 P.2d 222, 227 (1985). McMillin argues the trial court abused its discretion by denying relief on his claim that trial counsel had been ineffective for failing to request a *Dessureault* hearing based on the discrepancies between the testimony at trial of three witnesses, two of whom identified McMillin at trial as the driver of the stolen vehicle. He also claims counsel should have cross-examined one of those witnesses, and that counsel made statements during closing argument that essentially amounted to an admission of McMillin's guilt.

¶3 Based on the record before us, we cannot say the trial court abused its discretion in denying McMillin's petition for post-conviction relief. The trial court clearly identified the claims McMillin had raised and resolved them correctly in a thorough, well-reasoned minute entry. We adopt the court's ruling and there is no need to re-explain it here. *See State v. Whipple*, 177 Ariz. 272, 274, 866 P.2d 1358, 1360 (App. 1993). McMillin also argues that, at the very least, he was entitled to an evidentiary hearing. A defendant is entitled to a hearing only if he raises a colorable claim for relief which is one that, if taken as true, likely would have changed the outcome of the case. *State v. Watton*, 164 Ariz. 323, 328, 793 P.2d 80, 85 (1990). Based on the court's proper determination that McMillin did not present a colorable claim for relief, the court correctly dismissed his petition without conducting an evidentiary hearing.

¶4

We grant the petition for review but deny relief.

PHILIP G. ESPINOSA, Presiding Judge

CONCURRING:

JOSEPH W. HOWARD, Chief Judge

VIRGINA C. KELLY, Judge.